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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 26

UNITED STATES OF AMERICA
and
BORG-WARNER CORPORATION (DETROIT GEAR DIVISION),
Appellants,
vs.
CITY OF DETROIT, a Municipal Corporation,
Appellee

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MICHIGAN

BRIEF FOR APPELLEE

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QUESTION PRESENTED

We accept the introductory statement to the question presented on page two of appellants' brief with two additions which we have emphasized in restating it.

The City of Detroit has assessed and collected taxes from a lessee of the United States (Borg-Warner) pursuant to a state statute which directs that taxes shall be

collected from a lessee or user of tax-exempt realty *used in connection with a business conducted for profit* "in the same amount and to the same extent as though the lessee or user were the owner of such property." A proviso in the statute creates an exception should the United States make an equivalent payment in lieu of these taxes. *The statute also makes certain other exceptions which we shall discuss later in this brief.* The statute further provides that the taxes shall constitute a debt of the lessee or user to the taxing unit but shall not become a lien against the property.

Apparently, appellants have decided that the five questions presented in their jurisdictional statement on pages 3-5 can and should be merged into the following single question which they state in their brief on page 2 is the question presented in this case:

> "Whether Michigan Public Act 189 of 1953, on its face and as here applied, is unconstitutional in that it invades the immunity of federal property from taxation by the states."

We are in accord with their view and accept the single question, above stated, as the question presented in this case.

STATEMENT

Appellee accepts the statement in appellants' brief on pages 2-9 with the following additions:

Appellants state on page 4 of their brief: "Such valuation was set down upon the personal property tax rolls of the City of Detroit (R. 97), and a tax bill, characterizing the subject of the tax as personal property (R. 2, 11, 14) was issued to Borg-Warner (for the year 1954) in the amount of $12,323.50, a sum more than 3.5% of the assessed valuation."

It should be observed and we wish to add that the personal property assessment roll (referred to above by appellants as the personal property tax rolls) carried the notation, "Leased Land Bldg. Act 189 P. A. 1953" (Defendant's Exhibit 2, R. 97). The tax bill issued to Borg-Warner also carried the same notation (R. 11), and it is stated in plaintiffs' declaration that, "Said tax bill recites that the tax so levied was assessed under the provisions of Act 189, Public Acts of 1953, of the State of Michigan" (R. 2).

We also wish to add that a witness for appellee testifying in relation to the above described assessment roll (Defendants' Exhibit 2, R. 97) gave testimony as to the owner and lessee of each of the four parcels shown on the assessment roll, testifying that the owners of each were the United States of America or a municipal corporation of the State of Michigan (R. 33).

We further add that it was stipulated that the tax was assessed, levied and billed to Borg-Warner in conformity with the provisions of Act 189, by the City of Detroit (R. 34).

SUMMARY OF ARGUMENT

The United States owns certain real property which it leased to Borg-Warner. The City of Detroit, appellee, taxed Borg-Warner under the provisions of Act 189 P. A. Michigan 1953 (set forth hereinafter under "History of Act 189") in the same amount and to the same extent as though it were the owner of such property.

Appellants contend that Act 189 is unconstitutional because it actually imposes an ad valorem tax on the immune property of the United States, since the full value of the property is used as a measure of the tax.

Appellee contends that Act 189 imposes a specific tax (similar to an excise tax) on Borg-Warner for the privilege of using the tax-exempt property in connection with a business conducted for profit and that such a tax may be measured by the full value of the United States property.

Since Act 189 does not expressly provide for an ad valorem tax "on the property", or a tax on the "lessee's interest" or a tax on the "privilege of using" the property, we must look to the intention of the legislature to determine the nature of the tax.

The Michigan Supreme Court held that Act 189 manifested an intention on the part of the legislature to eliminate a discrimination between users of private and public property and that the tax imposed under the Act is a specific tax on the privilege of using the United States property in connection with a business conducted for profit, which tax may be measured by the full value of the United States property.

That such a privilege tax may be measured by the full value of United States property is supported by *Educational Films Corp. v. Ward*, 282 U. S. 379 (1931) and *Esso Standard Oil v. Evans*, 345 U. S. 495 (1953).

The direct burden or incidence of the tax under Act 189 is on Borg-Warner and not the United States or its property and the tax does not interfere in any substantial way with the performance of federal functions. Section two of the Act provides that the taxes shall be assessed to the lessee or user of the tax-exempt property; that they shall not become a lien against the property; and, that when due they shall constitute a debt due from the lessee or user recoverable by direct action of assumpsit.

The fact that the indirect economic burden of the tax was passed on to the United States by agreement under the amendment to the lease (R. 93) is no longer fatal to the tax. *James v. Dravo Contracting Co.*, 302 U. S. 134 (1937); *Esso Standard Oil v. Evans*, 345 U. S. 495, 499 (1953).

The tax under Act 189 is not discriminatory. Subject to the exceptions therein specified, it applies to all tax-exempt real property used in connection with a business conducted for profit, whether such property is owned by the United States, the State of Michigan or any of its political subdivisions, or by hospitals, churches or other charitable institutions.

The fact that Act 189 provides for certain exceptions does not make it discriminatory. *Carmichael v. Southern Coal & Coke Co.*, 301 U. S. 495, 509-510 (1937).

Appellants rely principally on *United States v. Allegheny County*, 322 U. S. 174 (1944), which they cite on fourteen pages of their brief, but that case is distinguishable from the case at bar in that it involved an ad valorem

general property tax statute and not a statute providing for a tax on a privilege, such as involved in the case at bar.

ARGUMENT

Appellants contend on page 10 of their brief that "Since *McCulloch v. Maryland*, 4 Wheat. 316, it has been settled constitutional doctrine that property of the United States is beyond the taxing power of the states."

They further contend on page 14 of their brief that "Since *James v. Dravo Contracting Co.*, 302 U. S. 134, in which the United States supported the constitutionality of the state tax involved, it has also been settled that non-discriminatory state taxation of those with whom the Federal Government chooses to deal (e. g., contractors or suppliers) does not interfere 'in any substantial way with the performance of federal functions' (p. 161) merely because there may be indirect economic effect, i. e., passing some or all of the tax along to the Government as consumer."

We propose to show that the tax under Act 189 is not imposed upon any property of the United States; that it is not discriminatory and does not interfere in any substantial way with the performance of federal functions even though the United States bears the indirect economic burden of the tax which is passed on to it under the amendment to the lease (R. 93).

We also propose to show that the tax under Act 189 is a specific tax imposed upon the lessee (Borg-Warner) for the privilege of using the tax-exempt property in a business conducted for profit, which tax may be measured by the full value of the government property.

History of Act 189 P. A. Mich. 1953 (Mich. Stat. Ann. 7.7(5) and 7.7(6))

Act 189 originated in House Bill 46 which was amended in the House to read as follows:

> "A bill to provide for the taxation of lessees and users of tax-exempt property.
>
> *The People of the State of Michigan enact:*
>
> Sec. 1. When any property, real or personal, which for any reason is exempt from taxation, is leased, loaned or otherwise made available to and used by a private individual, association or corporation engaged in business for profit, *the lessee or user of such property* shall be subject to taxation in the same amount and to the same extent as though the lessee or user were the owner of such property: Provided, however, That the foregoing shall not apply to federal property for which payments are made in lieu of taxes and in amounts equivalent to taxes which might otherwise be lawfully assessed." (Emphasis supplied.)

The bill, as amended, passed the House by a unanimous vote on March 16, 1953. House Journal No. 36, p. 401.

The bill was amended in the Senate and broken into two sections. The words "the lessee or user of such property", inserted in parentheses below were apparently inadvertently omitted. In any event the bill as it emerged from the Senate and as again passed by the House, read as follows:

> "AN ACT to provide for the taxation of lessees and users of tax-exempt property.
>
> *The People of the State of Michigan enact:*
>
> Section 1. When any real property which for any reason is exempt from taxation is leased, loaned or otherwise made available to and used by a private

individual, association or corporation in connection with a business conducted for profit, except where the use is by way of a concession in or relative to the use of a public airport, park, market, fair ground or similar property which is available to the use of the general public, (the lessee or user of such property) shall be subject to taxation in the same amount and to the same extent as though the lessee or user were the owner of such property: Provided, however, That the foregoing shall not apply to federal property for wihch payments are made in lieu of taxes in amounts equivalent to taxes which might otherwise be lawfully assessed or property of any state-supported educational institution. (Words in parentheses supplied.)

Sec. 2. Taxes shall be assessed to such lessees or users of real property and collected in the same manner as taxes assessed to owners of real property, except that such taxes shall not become a lien against the property. When due, such taxes shall constitute a debt due from the lessee or user to the township, city, village, county and school district for which the taxes were assessed and shall be recoverable by direct action of assumpsit."

The Act was adopted in both Houses without a dissenting vote. Senate Journal No. 77, p. 1255; House Journal No. 81, p. 1602.

Methods of Taxation in Michigan

Under the Constitution of Michigan there are two general methods of taxation—ad valorem and specific. *Pingree v. Auditor General*, 120 Mich. 95, 108 (1899); *C. F. Smith Co. v. Fitzgerald*, 270 Mich. 659, 673 (1935).

One of the definitions of ad valorem taxes, given in the *Pingree case* (p. 99), *supra*, which is similar to that given in *Cooley on Taxation*, Vol. 1 (4th Ed.) p. 143, is:

> "Ad valorem—according to value—* * * An ad valorem tax is a tax or duty upon the value of the article or thing subject to taxation."

One of the definitions of specific taxes given in the *Pingree case* (p. 98) *supra*, is Cooley's definition, which may also be found in his work on Taxation, Vol. 1 (4th Ed.) p. 143 from which we quote:

> "'A specific tax is one which imposes a specific sum by head or number, or by some standard of weight or measurement, and which requires no assessment beyond a listing and classification of the subjects to be taxed."

A specific tax need not be proportional to the value of the thing taxed. *Shivel v. Kent County Treasurer*, 295 Mich. 10, 18 (1940).

License taxes, privilege taxes and occupation taxes are specific taxes and not ad valorem taxes upon property. *C. F. Smith v. Fitzgerald, supra.*

Cooley's definition of a specific tax, quoted above, was considered in *Union Trust Co. v. Probate Judge*, 125 Mich. 487 (1901), where the trust company petitioned the court for a writ of prohibition to restrain the probate judge of Wayne County from enforcing the provisions of the inheritance tax law (Act 188 P. A. Mich. 1899). Under that law the value of the property in the estate was used as a measure of the tax.

The Attorney General conceded that if the inheritance tax is a tax upon property, it is in violation of Sec. 11, Article 14 of the Michigan Constitution of 1850 (now Section 3, Art. 10 of Mich. Const. of 1908), unless it can be called a specific tax. Sec. 11, Article 14 provided that "The legislature shall provide a uniform rule of taxation except on property paying specific taxes. * * *"

The main point for determination was whether the inheritance tax law imposed an ad valorem tax on property or whether it imposed a specific tax on the privilege of inheritance or succession.

In holding the law valid as imposing a specific tax on the inheritance or succession and not an ad valorem tax on the property, the Court said:

> "The conclusion that this statute imposes an *ad valorem* tax upon property can only be avoided by saying that it is not a tax upon the property, and that, therefore, the *ad valorem* feature, which, so far as assessment upon the value is concerned, is certainly present is wanting, because it is not an assessment upon the value of the property taxed. In short, the claim of the respondent is that this is a tax upon a privilege, viz., the privilege of succession, and that there is a legal distinction between a tax upon the property itself, assessed upon the basis of its value, and a tax upon this privilege, assessed upon the basis of *its* value, which is measured by the value of that which is the subject of the privilege, viz., the property. Unless this is a distinction without a substantial difference, the respondent is right."

Intention of Legislature

Although the words "the lessee or user of such property" were inadvertently omitted from Section 1 of the Senate version of the bill, which was finally adopted as Act 189 (see under heading "History of Act 189 P. A. Mich. 1953", *supra*) it is clear from a reading of the Act as a whole "who" the legislature intended to tax. This is evident in the title of the Act which reads:

> "An Act to provide for the taxation of *lessees and users* of tax-exempt property." (Emphasis supplied.)

A reading of Section 2 of the Act removes all doubt, if any existed, as to "who" is being taxed. It provides:

> "Taxes shall be *assessed to such lessees or users* of real property and collected in the same manner as taxes assessed to owners * * *." (Emphasis supplied.)

As to "what" is being taxed is also clear from a reading of the Act as a whole. The Act discloses that it was the intention of the legislature to impose a *specific tax on the lessees and users of tax-exempt real property for the privilege of using that property "in connection with a business conducted for profit."*

Act 189 does not expressly provide for an ad valorem tax "on the real property", nor does it expressly provide for taxing either the "lessee's interest" or the "privilege of using" the tax-exempt real property. It does provide, however, that in connection with a business conducted for profit the lessee or user of such property "shall be subject to taxation in the same amount and to the same extent as though the lessee or user were the owner of such property."

Such a provision is not unreasonable, because ordinarily a lessee of private property bears the entire burden of the taxes which are either included in the rent or paid by the lessee in addition thereto. Furthermore, it evidences an intent on the part of the legislature to eliminate a discrimination between users of private and public property. In this connection the Supreme Court of Michigan said in *United States v. City of Detroit*, 345 Mich. 601, at pages 610-611:

> "As defendant in the instant case properly points out, lessees of private nontax-exempt real estate ordinarily bear the tax burden thereon either by direct payment thereof under lease requirements or by pay-

ment of rent sufficient to include the tax; and defendant reasons that the legislative intent here was to put such lessees of private property used by them in business conducted for profit on an equal footing with users of tax-exempt government property used by them in business conducted for profit, thus avoiding discrimination against the former and eliminating an element of unfair competition between them by requiring an equal tax burden as to both; and defendant urges that this does not evidence an intent on the part of the legislature to aim at or reach United States property for taxation but only to treat both classes of users equally. It is obvious that each of the cases cited by plaintiffs, as just above considered, is distinguishable from the instant case because in each of them either a local tax was sought to be imposed directly on immune property or income as such, or the sole purpose of the tax act was to reach it indirectly, whereas here, as previously considered, the tax is not on the immune property but on the privilege of using it, and the act imposing it is not aimed at that property but, rather, at removig a discrimination between users of private and of public property."

While we appreciate that the construction placed upon a state statute by a state court is not binding on this court in deciding a federal constitutional question, nevertheless, it will be given great weight. This court said in *Clyde v. Gilchrist*, 262 U. S. 94, 97 (1923):

> "* * * when we are dealing with a matter of local policy, like a system of taxation, we should be slow to depart from their judgment if there was no real oppression or manifest wrong in the result."

Appellants say on page 25 of their brief: "There is further eloquent testimony of this statute's purpose—the proviso clause of Section 1, which states in substance that the tax (though ostensibly upon the lessee) will be

forgiven if the United States makes a payment 'equivalent' to the tax. Michigan itself has thus recognized that under Act 189 the United States is the real taxpayer."

The exact wording of the proviso clause referred to by appellants is: "That the foregoing shall not apply to federal property for which payments are made in lieu of taxes in amounts equivalent to taxes which might otherwise be lawfully assessed * * *."

Michigan does not recognize by such a proviso that the United States is the real taxpayer for the proviso is not inconsistent with the purpose and intention of the legislature which, as noted above, is to put lessees of private property and lessees of tax-exempt government property, used in connection with a business conducted for profit, on an equal footing. If the United States makes a payment equivalent to taxes then the above mentioned purpose has been accomplished. The fact that the United State may assume the indirect economic burden of the tax will no longer invalidate the tax. *James v. Dravo Contracting Co.*, 302 U. S. 134 (1937); *Esso Standard Oil v. Evans*, 345 U. S. 495, 499 (1953).

The Tax Under Act 189, Being a Tax on a Privilege, May Be Measured by the Full Value of the United States Property

It has long been settled that a tax on a privilege may be measured by the full value of tax-exempt property.

In *Plummer v. Coler*, 178 U. S. 115 (1900) the court held a New York inheritance tax valid even though measured by the full value of tax-exempt United States bonds included in a bequest. The tax was held to be on the privilege of inheritance and not on the United States bonds.

In *Home Insurance Co. v. New York*, 134 U. S. 594 (1890), a corporation franchise tax measured by the corporation's dividends and capital stock which included tax-exempt United States bonds was held valid. In upholding the tax as a tax on the franchise and not on the United States bonds the court quoted with approval from *Society for Savings v. Coite*, 6 Wall. 594 (1868):

> "Nothing can be more certain in legal decision than that the privileges and franchises of a private corporation, and all trades and avocations by which the citizens acquire a livelihood, may be taxed by a state for the support of the state government. Authority to that effect resides in the state independent of the federal government, and is wholly unaffected by the fact that the corporation or individual has or has not made investment in federal securities."

In *Educational Films Corp. v. Ward*, 282 U. S. 379 (1931), a New York statute provided for an annual franchise tax on certain classes of domestic corporations for the privilege of doing business in the state. The tax was payable in advance for each year beginning November 1st at 4½% of the corporation's entire net income for its preceding fiscal year allocated to business carried on in the state.

The corporation challenged the tax assessed against it for the year beginning November 1, 1929 claiming that since the income upon which the tax is based includes royalties from United States copyrights which are federal instrumentalities, the tax is void.

In holding the tax valid as a tax on the privilege of doing business in the state and not a tax aimed at the federal copyrights the court said at page 388:

> "*If we look to the operation of the present statute, it is plain that it can have no application independ-*

ent of the corporation's enjoyment of the privilege of exercising its franchise. If appellant had ceased to do business before November 1, 1929, it would not have been subject to any tax under this statute, although it had received, during its preceding fiscal year, income which the statute makes the measure of the tax. Since it can be levied only when the corporation both seeks or exercises the privilege of doing business in one year and has been in receipt of net income during its preceding fiscal year, the tax, whatever descriptive terms are properly applicable to it, obviously is not exclusively on income apart from the franchise." (Emphasis supplied.)

The Court further said at page 389:

"While this court since *McCulloch v. Maryland*, 4 Wheat. 316, 4 L. ed. 579, has consistently held that the instrumentalities of either government, or the income derived from them, may not be made the direct object of taxation by the other (citing cases), it has held with like consistency that the privilege of exercising the corporate franchise is no less an appropriate object of taxation by one government merely because the corporate property or net income which is made the measure of the tax, may chance to include the obligations of the other, or the income derived from them. The constitutional power of one government to reach this permissible object of taxation may not be curtailed because of the indirect effect which the tax may have upon the other.

The precise question now presented was definitely answered in *Flint v. Stone Tracy*, 220 U. S. 107, 162 *et seq.*, 55 L. ed. 389, 417, 31 S. Ct. 342, Ann. Cas. 1912B, 1312, which upheld a Federal tax, levied upon a corporate franchise granted by a state, but measured by the entire corporate income, including, in that case, income from tax exempt municipal bonds. In reaching this conclusion, the court reaffirmed the distinction, repeatedly made in earlier decisions, be-

> tween a tax, invalid because laid directly on governmental instrumentalities or income derived from them, and an excise which is valid because imposed on corporate franchises, even though the corporate property or income which is the measure of the tax embraces tax exempt securities or their income. (Citing cases.)"

The Court, also, on page 393, quoted with approval from *Miller v. Milwaukee*, 272 U. S. 713 (1927):

> "A tax very well may be upheld as against any casual effect it may have upon the bonds of the United States when passed with a different intent and not aimed at them."

Like the *Educational Films Corp. case, supra*, the tax imposed under Act 189 can have no application independent of the tax-exempt property, being *used* "in connection with a business conducted for profit." If the tax is "on the property" as contended by appellants, it would apply regardless of whether the property is *used* or not.

Also, like the *Educational Films case*, even though the tax imposed under Act 189 has a casual effect on the United States in that it bears the indirect economic burden of the tax which was passed on to it by amending the lease (R. 93), the tax was not aimed at the United States or its property, but was passed with a different intent, namely, to avoid discrimination between users of private and public property, as heretofore shown.

In *Flint v. Stone Tracy Co.*, 220 U. S. 107 (1911) and *Pacific Company v. Johnson*, 285 U. S. 480 (1932), corporate franchise taxes were upheld which were measured by income from tax-exempt municipal bonds.

Appellants contend that Act 189 is "special legislation" aimed at federal property and they cite *Miller v. Milwaukee*, 272 U. S. 713, in support of their position.

In that case Miller held stock in a Wisconsin corporation which owned tax-exempt United States bonds. The Wisconsin statute required the corporation to pay a tax on its income, but not on the interest or income derived from tax-exempt United States bonds. The interest on the United States bonds was credited to the corporation surplus account and later distributed to stockholders as dividends. The Wisconsin statute taxed the stockholders on the dividends only to the extent that they represented income of the corporation derived from the tax-exempt United States bonds. The court held the tax on the stockholders void because it was aimed solely at the United States bonds. The court was careful to point out, however, that "A tax very well may be upheld as against any casual effect it may have upon the bonds of the United States when passed with a different intent and not aimed at them."

The *Miller case* is distinguishable from the case at bar in that it did not involve a privilege or franchise tax. Also, in the case at bar, Act 189 was not aimed at the United States or its property, but was passed with a different intent, namely, to avoid discrimination between users of private and public property.

Appellants also cite *Macallan Co. v. Massachusetts*, 279 U. S. 620, in support of their contention.

In that case the original Massachusetts statute excepted interest from United States bonds in determining net income for purposes of measuring a franchise tax on domestic corporations. The statute was later amended to include tax-exempt securities in the measure of the franchise tax. The court in holding the tax invalid, said the amendment was specifically intended to reach the income from the tax-exempt United States bonds which had previously not been included in the measure of the tax. The court

also quoted with approval from *Miller v. Milwaukee*, 272 U. S. 713: "A tax very well may be upheld as a against any casual effect it may have upon the bonds of the United States when passed with a different intent and not aimed at them * * *."

The Macallan case is distinguishable from the case at bar on one of the grounds that distinguished the *Miller case, supra*, namely, Act 189 was not aimed at the United States or its property, but was enacted to avoid discrimination between lessees of private and public property.

Appellants seek to show on pages 20-21 of their brief, by hypothetical cases of A, B and C, that Act 189 imposes a tax "on the whole of the property" and not on the "interest as may be in the lessee" because the tax is identical or equal to a tax on the property in all three hypothetical cases.

We will agree that the tax is not on the lessee's interest, but it is not on the property either. It is on the "beneficial personal use of the property" which this Court said in *United States v. Allegheny County*, 322 U. S. 174, 188 (1944), may be taxed.

As heretofore noted, the tax under Act 189 is a specific tax on the privilege of using the property. A specific tax need not be proportional to the value of the thing taxed. *Shivel v. Kent County Treasurer*, 295 Mich. 10, 18 (1940).

Since a specific tax is not required to be proportional to the value of the thing taxed which, in this case, is the privilege of using the property, the legislature can impose an amount which it considers reasonable for the privilege, in order to accomplish the result intended. The result intended by the legislature was to avoid discrimination between lessees of private and public property. Under such circumstances, it cannot be properly concluded that the tax is "on the whole of the property" merely because it equals a tax on the property.

Esso Standard Oil v. Evans Is Analogous

The case of *Esso Standard Oil v. Evans*, 345 U. S. 495 (1953) is analogous to the case at bar.

In that case, the United States entered into a contract with Esso to store government gasoline in its tanks. The gasoline was specifically exempt from state storage and use taxes under 55 Stat. 248. The State of Tennessee, under its statute, levied a privilege tax on Esso of 6 cents for each gallon of gasoline stored which amounted to $196,000.00. The United States intervened and claimed that the *Esso case* was analogous to *United States v. Allegheny County*. It said, in effect, that the tax in the *Esso case* is no less "on" the property of the United States than it was in the *Allegheny case*. The court was told that if the tax is sustained a liability of upwards of $4,000,000 will result. In holding the tax valid the court said at page 499:

> "This tax was imposed because Esso stored gasoline. It is not, as the Allegheny County tax was, based on the worth of the government property. Instead, the amount collected is graduated in accordance with the exercise of Esso's privilege to engage in such operations; so it is not, 'on' the federal property as was Pennsylvania's. Federal ownership of the fuel will not immunize such a private contractor from the tax on storage. It may generally, as it did here, burden the United States financially. But since *James v. Dravo Contracting Co.*, 302 U. S. 134, 151, 82 L. ed. 155, 167, 58 S. Ct. 208, 114 A. L. R. 318, this has been no fatal flaw."

In the *Esso case*, Tennessee taxed the "privilege of storing" tax-exempt property in connection with a business for profit. Act 189 taxes the "privilege of using" tax-exempt property in connection with a business con-

ducted for profit. In each case the tax is on a "privilege" measured either by the quantity or worth of the tax-exempt property. It is not on the property itself. There would appear to be no distinction between "quantity" or "worth" because in each instance the tax-exempt property itself is the measure of the tax on the privilege.

It will be noted in the above quotation from the *Esso case* that the court stated: "It is not, as the Allegheny County tax was, based on the worth of the government property."

We do not believe the Court meant by that statement that if the tax on the privilege of storing government gasoline was measured by the worth of the gasoline instead of the quantity stored that the tax in the *Esso case* would be void, because to attribute such a meaning to the statement would be contrary to the decisions in the *Plummer, Home Insurance and Educational Films cases*, heretofore discussed, which hold that a tax on a privilege may be measured by the value or worth of tax-exempt government-owned property. Rather, we believe that the court was seeking to point out the difference between a statute which imposes a tax on a privilege which may be measured by the value or worth of government-owned property and an ad valorem general property tax statute, such as involved in the *Allegheny County case*, which does not provide for a tax on a privilege, but imposes a tax directly on the property itself.

United States v. Allegheny County Distinguishable

Appellants rely heavily on *United States v. Allegheny County*, 322 U. S. 174 (1944), as the government did in the *Esso case*, *supra*, and they cite it on fourteen pages of their brief.

The *Allegheny County case*, however, is distinguishable from the case at bar in that it involved an ad valorem general property tax statute and not a statute providing for a tax on a privilege, such as involved in the case at bar.

In that case, the United States entered into a contract with the Mesta Machine Company to manufacture large field guns for the government. It leased certain machinery to Mesta for that purpose. The machinery was installed in the Mesta plant. Allegheny County included the value of the government-owned machines in assessing Mesta's real property under a Pennsylvania ad valorem general property tax statute.

In holding that the tax was on the immune property of the United States and therefore void, the Court said at pages 184-188:

> "It is not contended that the scheme of taxation employed by Pennsylvania is anything other than the old and widely used ad valorem general property tax. * * * This form of taxation is not regarded primarily as a form of personal taxation but rather as a tax against the property as a thing. Its procedures are more nearly analogous to procedures *in rem* than to those *in personam*. While personal liability for the tax may be and sometimes is imposed, the power to tax is predicated upon jurisdiction of the property, not upon jurisdiction of the person of the owner, which often is lacking without impairment of the power to tax. In both theory and practice the property is the subject of the tax and stands as security for its payment. (Emphasis supplied.)

The Pennsylvania statutes embody this scheme of taxation. They are a century old. The basic provision reads: 'The following *subjects and property* shall * * * be valued and assessed, and *subject to taxation.*' 'Taxes are declared to be a *first lien on said property.*' (Emphasis supplied.) It is only under these legislative provisions that the tax in question is laid.

The procedure of the assessors is consistent with no other theory than that the machinery itself was being assessed and taxed exactly as land was being assessed and taxed. * * *

We hold that the substance of this procedure is to lay an ad valorem general property tax on property owned by the United States. * * *

Mesta has some legal and beneficial interest in this property. It is a bailee for mutual benefit. Whether such a right of possession and use in view of all the circumstances could be taxed by appropriate proceedings we do not decide. * * *

We think, however, that the government's property interests are not taxable either to it or to its bailee. The 'government' is an abstraction, and its possession of property largely constructive. Actual possession and cutody of government property nearly always are in someone who is not himself the government but acts in its behalf and for its purposes. He may be an officer, an agent, or a contractor. *His personal advantages from the relationship by way of salary, profit, or beneficial personal use of the property may be taxed as we have held.* But neither he nor the government can be taxed for the government's property interest." (Emphasis supplied.)

The Michigan Supreme Court, after analyzing and quoting the above language from the *Allegheny County case*, held that it was distinguishable from the case at bar

and said in *United States v. City of Detroit*, 345 Mich. at pages 607-608:

> "Thus, the Michigan act provides that it is the users of tax-exempt property who shall be subject to taxation as contrasted with the Pennsylvania act considered in *Allegheny*, which provided that certain property should be subject to taxation. In further contrast with *Allegheny* and stated in the converse of the language therein, the tax at bar is a form of personal taxation and not a tax against the property as a thing—its procedures are more analogous to procedures *in personam* than *in rem*—the power to tax is not predicated upon jurisdiction of the property, but upon jurisdiction of the user—the property is not the subject of the tax and does not stand as security for its payment. These distinctions between *Allegheny* and the case at bar we think go to the roots of the problem of the nature of the taxes in the 2 cases and leave the holding in *Allegheny* that the tax there was on United States property without application here. * * * the tax is, therefore, not an ad valorem tax on real property of United States and void accordingly, but a specific tax on Borg-Warner's privilege of using it and hence valid. This squares with the above-quoted language from *Allegheny* to the effect that Mesta enjoyed a right of possession which the court seemed to suggest, without deciding, could be taxed by the state, and the further statement that it had theretofore held that a contractor's personal advantages from the beneficial personal use of United States property may be taxed by a state. That the economic burden of the tax, as distinguished from its legal incidence happens to fall on United States is no barrier to its validity. James v. Dravo Contracting Co., 302 U. S. 134, (58 S. Ct. 208, 82 L. ed. 155, 114 A. L. R. 918); Alabama v. King & Boozer, 314 U. S. 1 (62 S. Ct. 43, 86 L. ed. 3, 140 A. L. R. 615); Esso Standard Oil Co. v. Evans, 345 U. S. 495 (73 S. Ct. 800, 97 L. ed. 1174)."

While the decision in the *Allegheny case* is distinguishable from the case at bar, some of the statements of the court therein contained support appellee's position, as noted above.

Fourteenth Amendment Not Violated

Appellants contend on page 22 of their brief that Act 189 violates the Fourteenth Amendment. They say, "It may be added, that even if viewed as a tax upon the lessee, the statute would suffer from a constitutional infirmity, for it invokes a conclusive presumption which is wholly arbitrary and must fall under the Fourteenth Amendment; the presumption that the bundle of rights enjoyed by a lessee of tax-exempt property has the same value as the fee itself."

There might be some merit to appellants' contention if Act 189 imposed a tax on the lessee's interest, but, as heretofore demonstrated, Act 189 imposes a specific tax on the privilege of using tax-exempt real property in connection with a business conducted for profit and not a tax on the lessee's interest in the property.

Section 6 of the Military Leasing Act of 1947 Not Applicable

On Page 19 of appellants' brief they refer to Section 6 of the Military Leasing Act of 1947 (34 U. S. C. 1952 ed., Sec. 522e). They contend that under this section the United States waived immunity from taxation by making the "lessee's interest" subject to state or local taxation. They further contend that the lessee's interest may not be measured by the full value of the United States property.

We agree with appellants that Section 6 makes the "lessee's interest" subject to state and local taxation and there might be some merit to their contention that the "lessee's interest" may not be measured by the full value of United States property, but Act 189 does not tax the "lessee's interest." It imposes a specific tax on the privilege of using tax-exempt property in connection with a business conducted for profit.

The Military Leasing Act of 1947 does not prohibit a specific tax on the privilege of using United States property and, to our knowledge, there is no other legislation that prohibits such a tax.

The Direct Burden or Incidence of the Tax Under Act 189 is on Borg-Warner and Not the United States or Its Property

It is clear from a reading of Act 189 that the direct burden or incidence of the tax falls upon the lessees or users of the tax-exempt property and not upon the United States or its property and that the tax does not interfere in any substantial way with the performance of federal functions.

Section 2 of Act 189 provides for the assessment and collection of taxes:

> "Taxes shall be assessed to such lessees or users of real property and collected in the same manner as taxes assessed to owners of real property, except that such taxes shall not become a lien against the property. When due, such taxes shall constitute a debt due from the lessee or user to the township, city, village, county and school district for which the taxes were assessed and shall be recoverable by direct action of assumpsit."

Under this section the United States is not assessed for the taxes and there is no lien imposed upon its property. The liability for payment of the taxes is on Borg-Warner and not the United States. In the event of default in payment of the taxes, they are recoverable by a direct action of assumpsit against the lessee (Borg-Warner) and not the United States.

Thus, Act 189 revamped customary assessment procedure from *in rem* to *in personam*. No jurisdiction was sought over the property of the United States by lien, or over the United States itself by process of any kind.

The land and buildings leased by Borg-Warner were entered on the personal property assessment roll of the City of Detroit for 1954 but with this notation: "Leased Land Bldg. Act 189 P. A. 1953" (Defendant's Exhibit 2, R. 97); thus calling attention to the fact that the assessment was subject to the provisions of Act 189 and not the general property assessment laws which are applicable to property appearing on personal property assessment rolls.

The tax bill sent to Borg-Warner also carried the same notation, namely, "Leased Land Bldg. Act 189 P. A. 1953" (R. 11).

As heretofore noted, while the United States bears the indirect economic burden of the tax which is passed on to it by agreement under the amendment to the lease (R. 93) this will not invalidate the tax. *James v. Dravo Contracting Co.*, 302 U. S. 134 (1937); *Esso Standard Oil v. Evans*, 345 U. S. 495, 499 (1953).

The Tax Under Act 189 Is Not Discriminatory

Subject to the exceptions therein specified, Section 1 of Act 189 provides in part:

> "When *any* real property which for *any reason is exempt* from taxation is leased, loaned or otherwise made available to and used by a private individual, association or corporation in connection with a business conducted for profit, * * * the lessee or user of such property shall be subject to taxation * * *." (Emphasis supplied.)

Thus, Act 189 applies to all tax-exempt real property used in connection with a business conducted for profit, subject to the exceptions therein specified, whether such property is owned by the United States, the State of Michigan or any of its political subdivisions or by hospitals, churches or other charitable institutions.

The exceptions specified in Act 189 to which the Act does not apply are:

1. Where the use is by way of a concession in or relative to the use of a public airport, park, market, fairground or other similar property which is available to the use of the general public.

2. In the case of federal property for which payments are made in lieu of taxes in amounts equivalent to taxes which might otherwise be lawfully assessed.

3. Property of any state-supported educational institution.

However, the fact that Act 189 provides for exceptions or exemptions does not make it discriminatory.

In *Carmichael v. Southern Coal & Coke Co.*, 301 U. S. 495 (1937) which involved the constitutionality of the Alabama Unemployment Compensation Act the Court said at pages 509-510:

> "It is inherent in the exercise of the power to tax that a state be free to select the subjects of taxation and to grant exemptions. Neither due process nor equal protection imposes upon a state any rigid rule of equality of taxation. See Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 237, 33 L. ed. 892, 895, 10 S. Ct. 533; Lawrence v. State Tax Commission, 286 U. S. 276, 284, 76 L. ed. 1102, 1108, 52 S. Ct. 556, 84 A. L. R. 374. This court has repeatedly held that inequalities which result from a singling out of one particular class for taxation or exemptions infringe no constitutional limitations. (Citing many cases:)
>
> Like considerations govern exemptions from the operation of a tax imposed on the members of a class. A legislature is not bound to tax every member of a class or none. It may make distinctions of degree having a rational basis, and when subjected to judicial scrutiny they must be presumed to rest on that basis if there is any conceivable state of facts which would support it. (Citing cases.)
>
> This restriction upon the judicial function, in passing on the constitutionality of statutes, is not artificial or irrational. A state legislature, in the enactment of laws, has the widest possible latitude within the limits of the Constitution. In the nature of the case it cannot record a complete catalogue of the considerations which move its members to enact laws. In the absence of such a record courts cannot assume that its action is capricious, or that, with its informed acquaintance with local conditions to which the legislation is to be applied, it was not aware of facts which afford reasonable basis for its action. Only by faithful adherence to this guiding principle of judicial review of legislation is it possible to preserve to the legislative branch its rightful independence and its ability to function."

It should be noted that the personal property assessment roll of the City of Detroit for 1954 (Defendant's Exhibit 2, R. 97) not only contains United States property but also tax-exempt property of other taxing units of government which is leased and which is subject to the provisions of Act 189. Appellee's witness gave testimony as to the owner and lessee of each of the four parcels shown on the assessment roll (Defendant's Exhibit 2, R. 97), testifying that the owners of each were the United States or a municipal corporation of the State of Michigan (R. 33).

CONCLUSION

The judgment of the court below should be affirmed.

Respectfully submitted,

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